Supreme Court, U.S.
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No. 95-260

IN THE

# Supreme Court of the United States

OCTOBER TERM 1995

AIU INSURANCE CO., ET AL.,

*Petitioners,*

v.

W. R. GRACE AND COMPANY - CONN., ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**Dated: September 14, 1995**

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## QUESTION PRESENTED

Whether there is a conflict among the circuits concerning application of the clearly erroneous standard of review to a district court's resolution of the inherently factual question of whether the parties intended to form a binding agreement.

## RULE 29.1 STATEMENT

Respondent W. R. Grace and Company – Conn. ("Grace") is a corporation organized under the laws of Connecticut and is a wholly-owned subsidiary of W. R. Grace & Co. Grace's subsidiaries or partnerships, other than wholly-owned operations, are: A-O Grace Kaustik, A-O Grace Kriz, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Cormix Middle East LLC, Dearborn I.E.I. (India) Private Ltd., Emirates Chemicals LLC, Grace Cocoa Associates, L.P., Grace Offshore Turnkey, Grace Ventures Partnership II, Guangzhou Nanfang NMC Hemodialysis Center Company Limited, HIC Pharmacy Services, L.P., Healthtech Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, Metreon, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kaisha, North Suburban Dialysis, OB One & IVtoo, Palm Springs I.V. Care II, Parade & Omicron Sdn. Bhd., Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, VNA-NMC Homecare Partnership, Renal Services (Malaysia) Sdn. Bhd., and Riggers Dialysatoren Produktion Thalheim GmbH & Co. K.G.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## STATEMENT OF THE CASE

Various respondent school districts and public entities in the State of Texas (collectively, "Dayton ISD") brought suit against respondent W. R. Grace and Company - Conn. ("Grace") for the cost of removing from their buildings asbestos-containing products manufactured by Grace. Grace filed a third-party action against certain of its excess insurance carriers (including petitioners) to recover defense costs and indemnity for the claims asserted by Dayton ISD. Grace and Dayton ISD eventually settled the main case. As part of the settlement, Grace assigned to Dayton ISD a percentage of any recovery it obtained in the third-party action against its insurers. Dayton ISD then intervened in the third-party action against petitioners and Grace's other excess insurers.

Grace and petitioners entered into settlement discussions beginning in the spring of 1992. In November, the parties reached an agreement in principle whereby petitioners agreed to pay on an on-going basis specified percentages of Grace's asbestos-related liabilities (including defense costs, settlements and judgments). Grace, in turn, agreed to discount by 20% the total insurance coverage provided by petitioners, thereby capping petitioners' total exposure at approximately $420 million. Between November 1992 and April 1993, the parties finalized the terms of their settlement and exchanged draft agreements reflecting those terms. Grace and petitioners reached final agreement on all essential terms of their settlement by late April, and those terms were reflected in a settlement agreement circulated on April 23, 1993.

On June 11, 1993, petitioners made a payment to Grace of $15.3 million "pursuant to" and in compliance with the terms of the settlement. Although the settlement agreement had not yet been executed, petitioners assured Grace that the agreement was being circulated, that some signatures had been obtained, and that the remaining signatures would be obtained shortly. On August 30, petitioners made a second payment to Grace of $15.3 million — again, "pursuant to" and in compliance with the terms of the agreement. Throughout the summer and early fall of 1993, petitioners repeatedly reassured Grace that there were no open terms or outstanding disagreements and that a fully signed settlement agreement would be forthcoming shortly. Petitioners also assured Grace that the next payment due under the settlement would be made, as required, in October.

On September 1, 1993, the Second Circuit issued its opinion in *Maryland Casualty Co. v. W. R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 655 (1994). That decision would have — but for the settlement — effectively reduced petitioners' potential exposure for Grace's asbestos-related liabilities from amounts exceeding $500 million to approximately $60 million. On October 7, 1993, petitioners, citing only the Second Circuit's opinion in *Maryland Casualty*, repudiated their settlement with Grace. They did so notwithstanding that, when the settlement was being negotiated, both sides were aware of and

obviously accepted the uncertainties and risks created by the pendency of the *Maryland Casualty* case in the Second Circuit.

Grace then moved the district court to enforce the settlement agreement. The district court conducted an evidentiary hearing on the motion on November 2 and 3, 1993, and then entered findings of fact and conclusions of law. The district court found, as a matter of fact, that the parties had reached an agreement concerning all of the essential terms of the settlement, that significant partial performance had occurred, and that the parties had not expressly reserved the right to be bound only by a written agreement. Although recognizing that agreements such as the one at issue are ordinarily in writing, the district court also found, again as a matter of fact, that the parties intended to be bound to their settlement even though the written settlement agreement had not yet been executed. The district court entered judgment enforcing petitioners' obligations under the settlement agreement with respect to the claims of Dayton ISD.

Petitioners appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit. The court of appeals correctly concluded that the central issue was whether the parties intended to be bound by their settlement agreement before formal execution of a written instrument. Appendix, *infra,* at 3a. The court held that, while the intent of the parties presented a close question of fact, the district court's resolution of the question was not clearly erroneous. The Fifth Circuit therefore affirmed the judgment of the district court.

## REASONS FOR DENYING THE WRIT

The court of appeals properly applied the clearly erroneous standard of review to the district court's determination of the parties' intent to be bound prior to formal execution of a written agreement. In this context, the intent of the parties has always been recognized as a question of fact. No conflict exists among the circuits concerning the standard of review applicable to such questions. Any conflict that may exist among the circuits concerning the appropriate standard for reviewing mixed questions of law and fact is irrelevant because fact questions were dispositive

of this case and because petitioners' appeal did not require the Fifth Circuit to review the resolution of any mixed questions. In any event, the Fifth Circuit has adopted the standard of review for mixed questions that is most favorable to petitioners; had any such questions been presented, Fifth Circuit precedent would have mandated de novo review.

**A. The Court of Appeals Reviewed a Finding of Intent of the Parties to a Contract for Clear Error and did not Address whether Other Issues of Contract Formation are Subject to Clear-Error Review.**

Petitioners maintain that certiorari should be granted to resolve a conflict among the circuits concerning application of clear-error or de novo review to the question of whether a contract has been formed. However, that issue does not exist in this case. Rather, the court of appeals' opinion turns entirely on the specific fact question of whether the parties intended to be bound by their settlement before a written agreement was executed. In evaluating this question, the court of appeals looked first to the provisions of the written agreement that had been circulated. The court found that those provisions were not

> conclusive on the question of whether the parties earlier had reached a binding oral agreement. Rather, they are signals of the parties' intent, albeit strong signals. That is, these provisions are relevant to the question of whether the parties intended to be bound before formal execution of the written instrument. This ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding.

Appendix, *infra,* at 3a. The court of appeals then applied the deferential clearly erroneous standard to the district court's fact-findings, and concluded that clear error had not occurred. The court of appeals' determination was based upon "one powerful set of circumstances — the partial performance of the contract." *Id.* The court of appeals concluded that the facts demonstrated the existence of "an agreement partially performed by payments in excess of $30 million where nothing else remained to be done in negotiations beyond the signature." Under such circumstances,

the court of appeals concluded that the district court's finding that the parties intended to be bound by the terms of their settlement before a written agreement was formally executed was not clearly erroneous.

Petitioners' assertion that the court of appeals applied clear-error review to the determination "that the parties had formed a binding and enforceable settlement agreement," Petition at 9, mischaracterizes the court of appeals' opinion. The court of appeals did not hold — or even mention — that issues of contract formation are subject to clear-error review. Rather, the court of appeals simply reviewed the fact finding that "the parties intended to be bound" for clear error. Thus, the issue described in the petition for certiorari is simply not presented.

**B. The Court of Appeals' Holding is Consistent with Decisions of this Court and other Circuit Courts.**

This Court has repeatedly held that the question of intent is an issue for the trier of fact and is subject to the clearly erroneous rule.[1] The circuits are in agreement that the intent of parties to be bound to a contract is a factual finding subject to the clearly erroneous standard of review.[2] The court of appeals correctly employed this standard, and there is no conflict between this holding and the holdings of other circuit courts of appeals.

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[1] *See, e.g., Pullman-Standard v. Swint,* 456 U.S. 273, 288 (1982); *Commissioner v. Duberstein,* 363 U.S. 278 (1960); *United States v. Yellow Cab Co.,* 338 U.S. 338, 341 (1949).

[2] *See, e.g., Paine Webber, Inc. v. Hartmann,* 921 F.2d 507 (3d Cir. 1990); *Stock Equipment Co., a Unit of General Signal Corp. v. Tennessee Valley Authority,* 906 F.2d 583 (11th Cir. 1990); *National Union Fire Insurance Co. v. Circle, Inc.* 915 F.2d 986 (5th Cir. 1990); *RCI Northeast Services Div. v. Boston Edison Co.,* 822 F.2d 199 (1st Cir. 1987); *Ginsu Products, Inc. v. Dart Industries, Inc.,*786 F.2d 260 (7th Cir. 1986); *Marine Transport Lines, Inc. v. International Organization of Masters, Mates, and Pilots,* 878 F.2d 41 (2d Cir.), *cert. denied,* 474 U.S. 825 (1985).

### C. No Conflict Exists Among the Circuit Courts Concerning the Appropriate Standard of Review to Apply to Generalized Questions Involving Contract Formation.

Even if this case presented the issue of the proper standard of review applicable to general questions of contract formation, it would not implicate any conflict among the holdings of the courts of appeals of the various circuits. Those courts have applied differing standards of review to issues that concern contract formation depending upon the basis for the district court's particular finding. If the issue only requires interpretation of the language in a contract, that is a question of law, subject to de novo review. If, on the other had, the question turns on the consideration of extrinsic evidence, then the district court's finding will be one of fact, reviewable only for clear error.[3] The applicable standard of review turns, as it should, on the underlying character of the district court's determination. Here, the district court's determination concerned the intent of the parties to be bound prior to execution of a written agreement — a determination that was appropriately subjected to the clearly erroneous standard of review.[4]

The cases cited by petitioners do not reveal a conflict among the circuits. Rather, they simply reflect application of different standards of review depending on the character of the underlying finding.[5] Moreover, even if those cases are read to reveal a split of

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[3] *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. 1991); *National Union*, 915 F.2d at 989; *L. K. Cornstock & Co., Inc. v. United Engineers & Constructors, Inc.*, 880 F.2d 219 (9th Cir. 1989); *Amerdyne Industries, Inc. v. POM Inc.*, 760 F.2d 875 (8th Cir. 1985).

[4] *National Union*, 915 F.2d at 989.

[5] *Bina v. Providence College*, 39 F.3d 21, 27 (1st Cir. 1994) (whether a contract is formed is a question of fact as long as the evidence is capable of supporting conflicting inferences); *A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1580-81 (Fed. Cir. 1994) (whether the language of a written document constituted a binding contract or a continuing offer is a question of law); *Daly Const., Inc. v. Garrett*, 5 F.3d 520, 521 (Fed. Cir. 1993) (whether the modification of a government contract is effective without issuance of a formal contract

authority among the circuit courts of appeals, such a split is not implicated by the court of appeals' opinion in the instant case. The Fifth Circuit applied the clearly erroneous standard of review to the district court's determination of the parties' intent to be bound, and not to the district court's finding of a valid enforceable contract.

### D. Any Conflict Concerning the Standard of Review Applicable to Mixed Questions of Law and Fact is not Implicated.

The intent of the parties was the core question presented on appeal to the Fifth Circuit. That is a pure question of fact, not a mixed question of law and fact, and it is the only determination to which the Fifth Circuit applied clear-error review. There is no reference in the court of appeals' opinion to any mixed questions of law and fact or to the standard of review applicable to such questions. The issue of the proper standard of review to apply to mixed questions of law and fact is thus not presented in this case.

The Fifth Circuit has resolved the issue of the standard applied to mixed questions in favor of petitioners' position. That is, the Fifth Circuit reviews mixed questions of law and fact de novo.[6] Thus, to the extent the Fifth Circuit resolved any mixed questions in affirming the judgment of the district court, it can be presumed

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modification is a question of law); *Devlin v. Ingram*, 928 F.2d 1084, 1089-90 (11th Cir. 1991) (proper standard to apply to undisputed facts is a question of law); *In re NWFX, Inc.*, 864 F.2d 588 (8th Cir. 1988) (applying a deferential standard to the lower court's underlying fact findings and reviewing de novo the question of whether a contract was formed); *Augusta Aviation v. United States*, 671 F.2d 445, 447 (11th Cir. 1982) (conclusions drawn from subsidiary facts are reviewed de novo); *Boudreaux v. ABC Insurance Co.*, 689 F.2d 1256, 1260 (5th Cir. 1982) (whether a car lease clause demonstrated the existence of an insurance contract was question of fact); *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993 (5th Cir. 1976) (whether agent had authority to enter a binding contract was question of fact).

[6] *Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1442 (5th Cir. 1988); *Amoco Transport Co. v. S/S Mason Lykes*, 768 F.2d 659, 663 (5th Cir. 1985); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 666 (5th Cir. 1983).

that the court followed established Fifth Circuit precedent and applied de novo review. The fact that the court's per curiam, unpublished opinion does not expressly state that de novo review was applied to any mixed questions cannot support petitioners' speculation that only a clear-error analysis was performed.

**E. No Special or Important Question is Presented.**

This diversity case largely involves state law issues of contract interpretation. The issues described by petitioners are not presented and could not properly be resolved on the facts of this case. Interestingly, in their petition to this Court, petitioners themselves concede that the case is largely based on questions of state law: "The central issue here was whether the purported settlement agreement complied with the specific requirements of New York law governing enforceability of agreements between litigants." Petition at 20. The court of appeals resolved this issue by reviewing the district court's factual finding that the parties to the settlement agreement intended to be bound by that agreement before it was executed. This holding is relevant only to the specific questions presented in this case, as reflected by the court of appeals' decision not to publish its opinion.[7] No reasons of the character set forth in Supreme Court Rule 10.1(a) for granting the petition for writ of certiorari are present.

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[7] Fifth Circuit Local Rule 47.5 addresses the publication of opinions of the court and provides that opinions that have no precedential value and that decide cases on the basis of well-settled principles of law should not be published.

## CONCLUSION

The Fifth Circuit Court of Appeals' opinion correctly resolved the questions presented, it is not in conflict with any other Circuit Court of Appeals, and it does not meet any of the other criteria for certiorari review by this Court. Accordingly, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Dated: September 14, 1995.

Respectfully submitted,

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# *APPENDIX*

*APPENDIX*

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

**No. 94-40155**

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
*Plaintiffs,*

VERSUS

U.S. MINERAL PRODUCTS CO., ET AL.,
*Defendants.*

---

W. R. GRACE AND COMPANY - CONN.,
*Defendant-Third Party Plaintiff-Appellee,*

AND

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,
*Intervenors-Appellees,*

VERSUS

ADMIRAL INSURANCE CO., ET AL.,
*Third Party Defendants,*

AND

AIG INSURANCE CO., ET AL.,
*Third Party Defendants, Appellants.*

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**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS**

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( 1:87-CV-00507-B )

## *APPENDIX*

Before REYNALDO G. GARZA and HIGGINBOTHAM, Circuit Judges, and FELDMAN*, District Judge.

PER CURIAM:**

The background facts of this case are complex, but the issues now brought to us are straightforward. With the benefit of briefs and excellent oral argument, we affirm for essentially the reasons stated by the district court.

We have little difficulty with the jurisdiction of the trial court. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S.Ct. 1673, 1677 (1994), is not apposite. The district court had diversity jurisdiction over the third party action and the authority to enforce a settlement of that case. It is no answer that the settlement of the case before Judge Fisher did more than resolve the case pending before him. There has been no showing that the absence of Illinois National Bank was fatal to the district court's power to enforce an agreement. In short, the district court had jurisdiction, and we see no impediment to its power to enter a settlement agreement. The issue is whether there was an enforceable agreement.

The district court found that the parties had reached a binding agreement to settle the case, and that nothing remained to be done beyond the signatures on the written instrument. This finding engages paragraphs of the unexecuted written instrument, including 6.4, which recites: This "Agreement shall become effective" after the last party executes it. Other provisions of the written instrument contemplate a written document. The parties unquestionably all intended that the Settlement Agreement find

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* District Judge of the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

expression in a formal instrument and, of course, that did not occur.

We are not persuaded, however, that the various provisions of the written document are conclusive on the question of whether the parties earlier had reached a binding oral agreement. Rather, they are signals of the parties' intent, albeit strong signals. That is, those provisions are relevant to the question of whether the parties intended to be bound before formal execution of the written instrument. This ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding. We could not sustain the district court's finding but for one powerful set of circumstances — the partial performance of the contract itself. The unexecuted written instrument contemplated substantial installment payments beginning in the summer of 1993. AIG made the first two installment payments totalling $30.6 million to Grace "pursuant to the agreement in principle" and was preparing to make the third of $15.7 million in October when on September 1, 1993, the Second Circuit decided the *Maryland Casualty* case. *See Maryland Casualty Co. v. W. R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993). This settlement was negotiated in the shadow of the *Maryland Casualty* appeal, and that decision reduced AIG's maximum exposure under the excess policies from $523 million to $65 million.

We find the question of whether the district court's finding of the parties' intent was clearly erroneous to be close. We think the district court could conclude that these payments were partial performance of the agreement between the parties. The payments resist description as small good faith payments intended to keep the prospects of settlement alive. They were in the amount and paid at the times called for under the agrement yet to be finally signed. Adding this partial performance evidence to the mix created a fact issue regarding the parties' intent, an issue for the district court. We are not persuaded that it is clearly erroneous.

Counsel earnestly calls attention to the consequences of finding a contract from negotiating efforts of parties when their efforts have not found final expression in an executed instrument. We

think those risks are allocated by the contract law of New York. These dire consequences are not posed on these unique facts. We have an agreement partially performed by payments in excess of $30 million where nothing else remained to be done in negotiations beyond the signature. While not a large percentage of the settlement sum, they remain large in absolute measure and sum to payments nearly half of AIG's total exposure after the *Maryland Casualty* case. The uncertainties in the *Maryland Casualty* case were presumably reflected in the settlement terms. A trier of fact could conclude that if the parties did not intend that the agreement to be signed was enforceable in the summer of 1993, the settlement amounts, allocating as they did the risk of an adverse appellate decision, makes little sense. There are doubtless many explanations for these events and we do not mean to seize on one over others, or to suggest that there are not also inferences supporting the contentions of AIG. As we explained, this presents a close issue of fact. The findings of the district court were not clearly erroneous.

AFFIRMED.